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ABSTRACT

Reasons for delays in the U.S. Department of Education's issues of regulations related to three federal laws are reviewed in this briefing report. Eighty-three regulations issued under the Education of the Handicapped Act amendments of 1986 and 1988, Higher Education amendments of 1986 and 1987, and Hawkins-Stafford Elementary and Secondary Improvement amendments of 1988 are examined and information on departmental improvement efforts are analyzed. Interviews with Department of Education and Office of Management and Budget (OMB) officials indicate that the primary reasons for delays in issuing regulations are: (1) the volume of regulations; (2) lengthy periods required to obtain and respond to public comments; (3) complex legal and policy issues; and (4) concurrent program duties. Appendix 1 identifies causes for and offices responsible for delays. Appendix 2 presents data on the number of calendar days taken to process 83 regulations within the Department of Education and OMB. The third appendix profiles selected educational regulations, which include the Regional Educational Laboratories and Research and Development Centers Program, Chapter 1--Migrant Education Program, National Resource Centers for Foreign Language Area Studies, Early Intervention Programs for Infants and Toddlers with Handicaps, and State Administered Adult Education and Discretionary Programs. Appendices 4 and 5 contain Department of Education and OMB comments, respectively, and appendix 6 lists major contributors. Eight tables and 15 figures are included. (LMI)

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United States General Accounting Office

GAO

Briefing Report to Congressional Requesters

November 1990

EDUCATION REGULATIONS

Reasons for Delays in Issuance

ED326976

EA022535

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Office of Educational Research and Improvement
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GAO

United States
General Accounting Office
Washington, D.C. 20548

Human Resources Division

B-239686

November 15, 1990

The Honorable Augustus F. Hawkins
Chairman, Committee on Education
and Labor
House of Representatives

The Honorable Pat Williams
Chairman, Subcommittee on
Postsecondary Education
Committee on Education and Labor
House of Representatives

The Honorable William F. Goodling
Ranking Minority Member
Committee on Education and Labor
House of Representatives

This briefing report responds to your request that we review the reasons for delays in the Department of Education's issuance of regulations related to three laws. We focused on the 83 regulations issued under the (1) Education of the Handicapped Act amendments of 1986 and 1988, (2) Higher Education amendments of 1986 and 1987, and (3) Hawkins-Stafford Elementary and Secondary School Improvement amendments of 1988. We also obtained information on Education's efforts to improve its regulation issuance. On March 20, 1990, we briefed your offices on our preliminary results. This report summarizes and expands on that information. (See app. I.)

Results in Brief

Education is required by statute to issue regulations within 240 days after the Congress enacts legislation or to seek an extension from the appropriate committees. For the 83 regulations we reviewed, only 13 (16 percent) were issued within 240 days. For the 70 regulations not issued within the time frame, Education submitted to the committees, as required, a schedule of revised issue dates. Fifty-one (73 percent) of the 70 regulations were not issued by the revised dates. An average of 389 days—ranging from 72 to 988 days—were spent to develop the 80 regulations that had been issued at the time of our review.

Education officials stated that the primary reasons regulations were not issued within established time frames included (1) the sheer volume of regulations to be issued during this time frame, (2) lengthy periods

required to obtain and respond to comments on the regulations, (3) complex legal and policy issues involved with the regulations, and (4) the fact that they were developing the regulations while performing their normal program duties.

As percentages of the total time required to issue the regulations, Education's program offices spent an average of about 53 percent, and its reviewing offices averaged about 23 percent. Obtaining the Office of Management and Budget's (OMB) clearance and responding to public comments each averaged about 11 percent of the total issuance time, while obtaining the Office of the Secretary's approval averaged about 2 percent.

Background

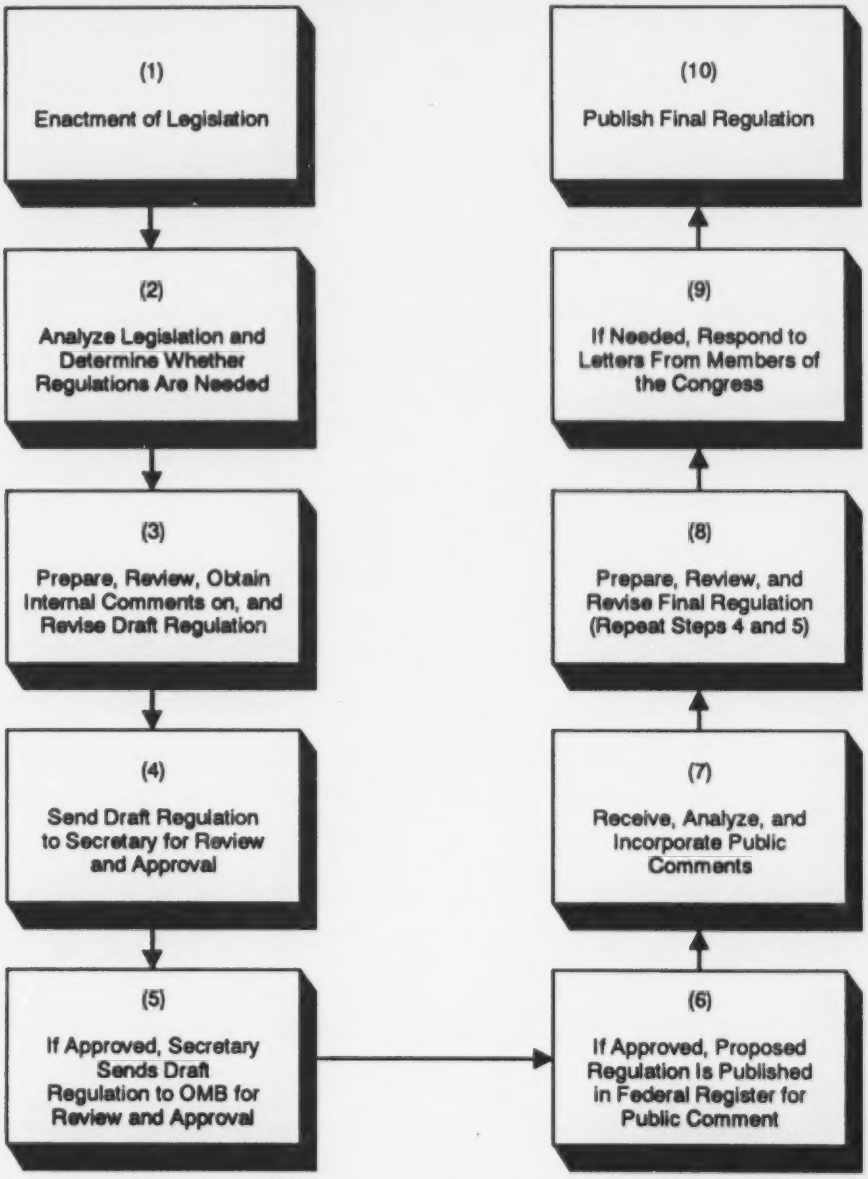
Section 431(g) of the General Education Provisions Act requires the Secretary of Education to issue regulations within 240 days of the enactment of legislation or to seek an extension. Within 60 days of enactment, the Secretary is required to submit to the appropriate committees a schedule of regulations to be issued within the following 180 days. If the schedule for issuance cannot be met, the Secretary is to submit a revised schedule for approval.

All 83 regulations included in our review were classified as nonmajor regulations.[1] For these rules, Education is to submit both the proposed (Notice of Proposed Rulemaking) and final rules to OMB 10 days before publication. In each instance, OMB is expected to complete its review within 10 days. However, the 10-day periods may be extended upon request from the Director, OMB. Given such notice, agencies are not to publish a proposed or final rule until OMB's views are considered. These procedures must be followed unless they conflict with deadlines imposed by statutes or judicial orders.

Education assigns regulation development to offices with program expertise and to appropriate program and staff offices to ensure compliance with legal, policy, and other requirements. The Office of the Secretary and OMB must approve proposed and final regulations before they are published in the Federal Register for public comment. Figure 1 illustrates the general sequence of events in Education's development of regulations.

[1]Regulations determined by executive departments and agencies to affect the economy by less than $100 million each year and not have a major impact on consumers, industries, or federal, state, or local governments.

Figure 1: General Steps in Education's Regulation Development


(1)
Enactment of Legislation
(2)
Analyze Legislation and Determine Whether Regulations Are Needed
(3)
Prepare, Review, Obtain Internal Comments on, and Revise Draft Regulation
(4)
Send Draft Regulation to Secretary for Review and Approval
(5)
If Approved, Secretary Sends Draft Regulation to OMB for Review and Approval
(6)
If Approved, Proposed Regulation Is Published in Federal Register for Public Comment
(7)
Receive, Analyze, and Incorporate Public Comments
(8)
Prepare, Review, and Revise Final Regulation (Repeat Steps 4 and 5)
(9)
If Needed, Respond to Letters From Members of the Congress
(10)
Publish Final Regulation

Scope and Methodology

We interviewed Education and OMB officials on their roles and responsibilities in the regulatory process, including reasons why the regulations were delayed. We charted the number of calendar days to process the 83 regulations (see app. II), and obtained information on actions to expedite the regulatory process. We also obtained additional information on those regulations with the longest issuance times from five program offices: Office of Education Research and Improvement, Office of Elementary and Secondary Education, Office of Postsecondary Education, Office of Special Education and Rehabilitative Services, and Office of Vocational and Adult Education. (See app. III.)

Regulations Were Not Issued Within Established Time Frames

Of the 83 regulations reviewed, only 13 (16 percent) were issued within the 240-day time frame. Twelve of the 13 were technical amendments that essentially incorporate statutory text into preexisting regulations, thereby eliminating many of the processing steps necessary for other regulations. Although Education submitted a revised schedule of new issuance dates for the 70 regulations not issued within the time frame, 51 (73 percent) of these still were not issued by the revised dates.

At the completion of our review in mid-April 1990, 80 of the 83 regulations had been issued. The average issuance time was 389 days, or nearly 13 months. (See table 1.) For the three unissued regulations, two had been in process for nearly 600 days and another for about 1,290 days as of mid-April 1990.

Table 1: Number of Regulations Issued by Days and Overall Average

	Number of regulations issued within					
Legislation	**0-240 days**	**241-365 days**	**366-540 days**	**More than 540 days**	**Total**	**Average number of days after enactment**
Education of the Handicapped Act Amendments	1	5	4	7	17	553
Hawkins-Stafford School Improvement Act Amendments	3	1	16	0	20	382
Higher Education Act Amendments	9	21	7	6	43	326
Total regulations	**13**	**27**	**27**	**13**	**80**	
Overall average days						**389**

The average of 389 days to issue the 80 regulations reflects both Education's and OMB's involvement in the regulatory issuance process. Education, responsible for the development and processing of regulations, averaged 348 (89 percent) of the 389 days—ranging from 63 to 912

days. OMB, essentially a reviewing office, averaged 41 (11 percent) of the 389 days—ranging from 4 to 116 days.

OMB has a total of 20 days to complete its review of regulations—10 days each for the proposed and final regulations. However, 58 (73 percent) of the 80 issued regulations were not reviewed within this time frame. (See app. II.) On average, OMB took 34 days to review 51 proposed regulations and 18 days to review the final versions of the 80 issued regulations. (See table 2.) Although 80 regulations were issued, 29 were issued as technical or emergency regulations, which require no publication of a proposed regulation.

Table 2: OMB's Average Number of Days to Review Regulations

Regulation	0-10 days	11-20 days	21-30 days	31 or more days	Total	Average number of days
Proposed	6	13	12	20	**51**	34
Final	36	24	7	13	**80**	18

Most Processing Time Spent by Program Offices

As expected, Education's program offices used most of the time in the preparation of Department regulations. Program offices are responsible for developing and drafting the regulation, as well as obtaining and responding to both internal and external comments. As shown in table 3, these offices averaged 53 percent of the total time to issue regulations.

Table 3: Percentage Shares of Time Spent Issuing Regulations

	Average percent of time from legislation enactment to regulation issuance[a]
Education program offices	53
Education reviewing offices	23
Office of the Secretary	2
OMB	11
Public comment period	11
Total	**100**

[a]This analysis represents 46 of the 80 regulations issued at the time of our review for which tracking information was available. For 34 of the 46 regulations, public comments were obtained.

Major Reasons for Not Meeting Established Time Frames

A major factor affecting processing time was the substantial increase in regulatory work load from September 1986 through April 1988, Education officials stated. They added that some regulations addressed complex legal and policy issues, requiring departmental staff to research complex legislative language, resolve policy questions, and balance responsibilities between federal and state or state and local governments in the final regulations.

Officials also said a large amount of time was spent obtaining and responding to internal and external—including OMB—comments on the regulations. In this regard, Education must provide at least 30 days for the public to comment on proposed regulations.

Education officials also told us that concurrent duties and responsibilities by program and reviewing offices contributed to delays in regulation processing. For example, program offices that write and process regulations must also perform their regular duties, such as awarding and administering grants or contracts and evaluating grantee performance. Similarly, the Education offices, such as the Office of General Counsel, review regulatory documents in addition to performing their usual duties. OMB officials noted that its regulatory review staff also has numerous other responsibilities that can contribute to processing delays.

Education Actions to Improve Regulatory Process

Education has taken several actions aimed at reducing the time it takes to publish regulations. In February 1986, a task force was established to develop procedures to help expedite the rulemaking process and resolve problems or differences that may arise among Education's program and staff offices that are providing review comments. In August 1987, Education's Division of Regulation Management issued a manual that provides instructions and standard formats for preparing regulations. An internal tracking system was also developed in August 1987 to help monitor the internal development and processing of regulations. We did not evaluate the effectiveness of these actions or whether additional actions could improve the regulatory process.

Agency Comments

Both Education and OMB provided written comments on a draft of this report. Education stated that the draft report, for the most part, accurately presented factual information but should have included additional information which is discussed in its comment letter. (See app. IV.) We made changes to the report as appropriate. However, some of Education's suggested changes either were beyond the scope of our

work or, in our view, lacked sufficient basis to warrant changing our report.

OMB stated that this report identified the contributions of key players in the regulation process, and that it would continue to work with Education to issue regulations expeditiously and responsibly. OMB suggested changes to how its regulation review responsibilities and the associated time frames were portrayed. Changes to the report were made, as appropriate. (See app. V.)

Copies of this briefing report are being sent to the Secretary of Education; the Director, OMB; and other interested parties. Please call me on (202) 275-1793 if you or your staffs have any questions about this report. Other major contributors are listed in appendix VI.

Franklin Frazier

Franklin Frazier
Director, Education
and Employment Issues

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Abbreviations

DORM	Division of Regulation Management
ED	Department of Education
GAO	General Accounting Office
LEA	local education agency
NPRM	Notice of Proposed Rulemaking
OMB	Office of Management and Budget

Regulation Processing: Delays in Issuing Education Regulations

Figure I.1

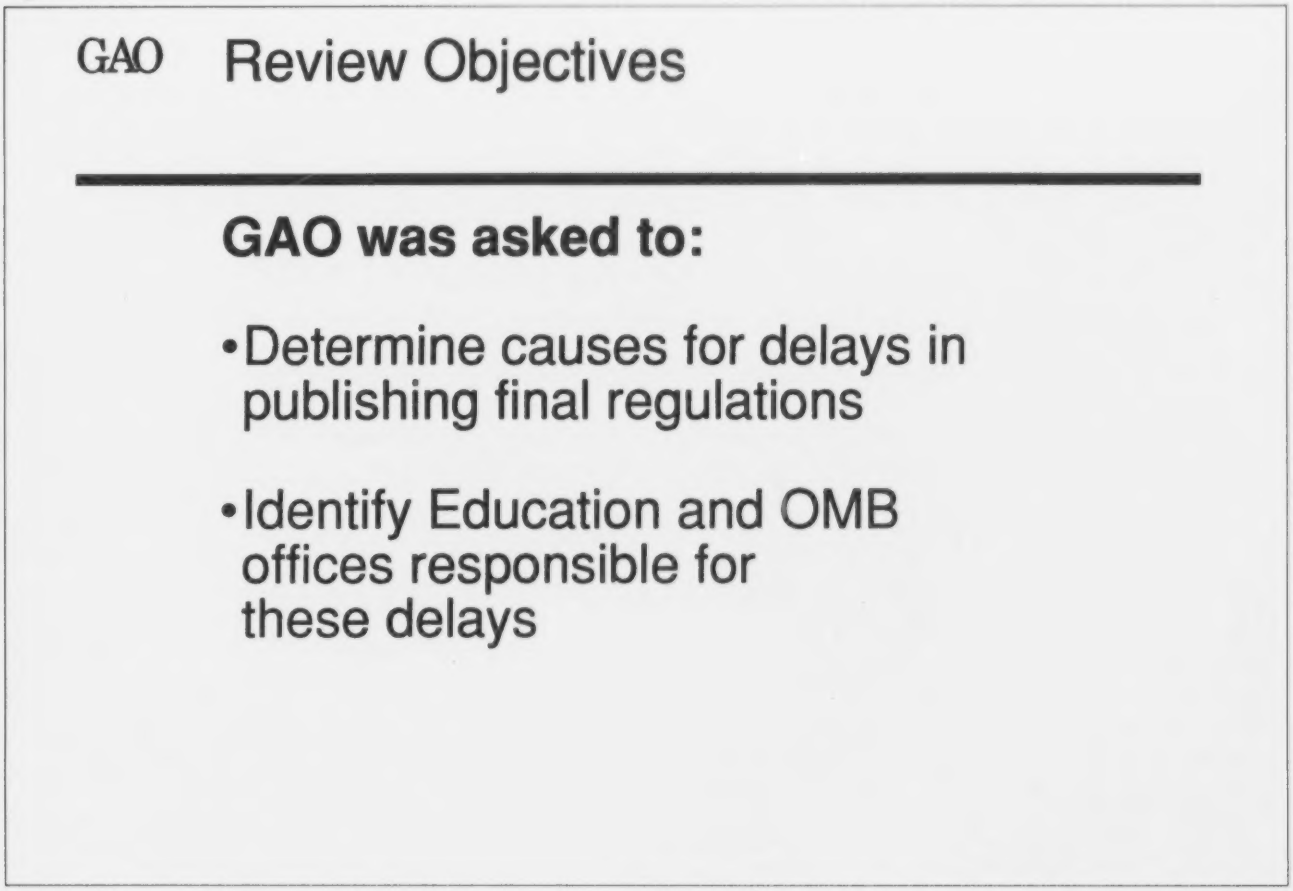

GAO
Review Objectives
GAO was asked to:
•Determine causes for delays in publishing final regulations
•Identify Education and OMB offices responsible for these delays

Figure I.2

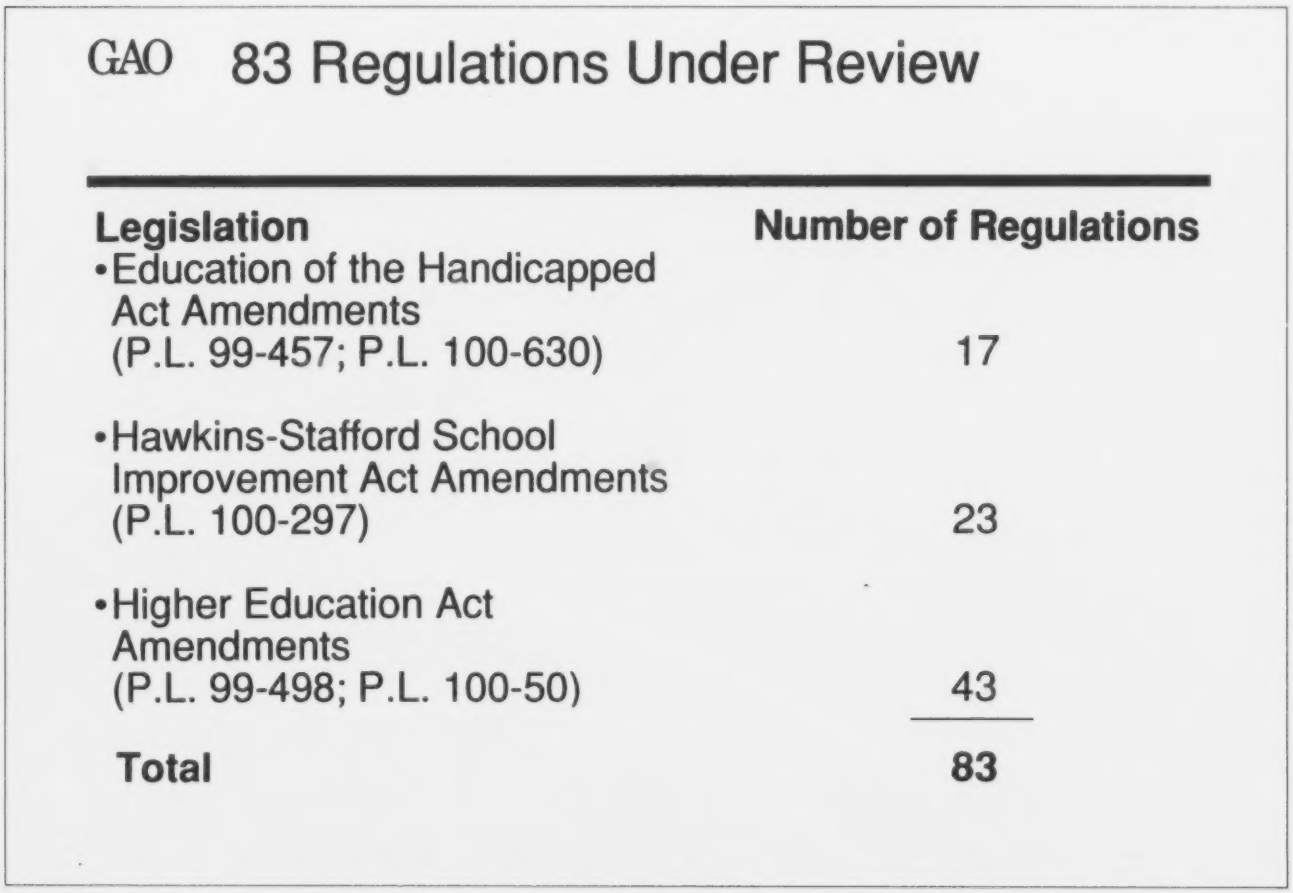

GAO 83 Regulations Under Review
Legislation
Number of Regulations
•Education of the Handicapped Act Amendments (P.L. 99-457; P.L. 100-630)
17
•Hawkins-Stafford School Improvement Act Amendments (P.L. 100-297)
23
•Higher Education Act Amendments (P.L. 99-498; P.L. 100-50)
43
Total
83

Figure I.3

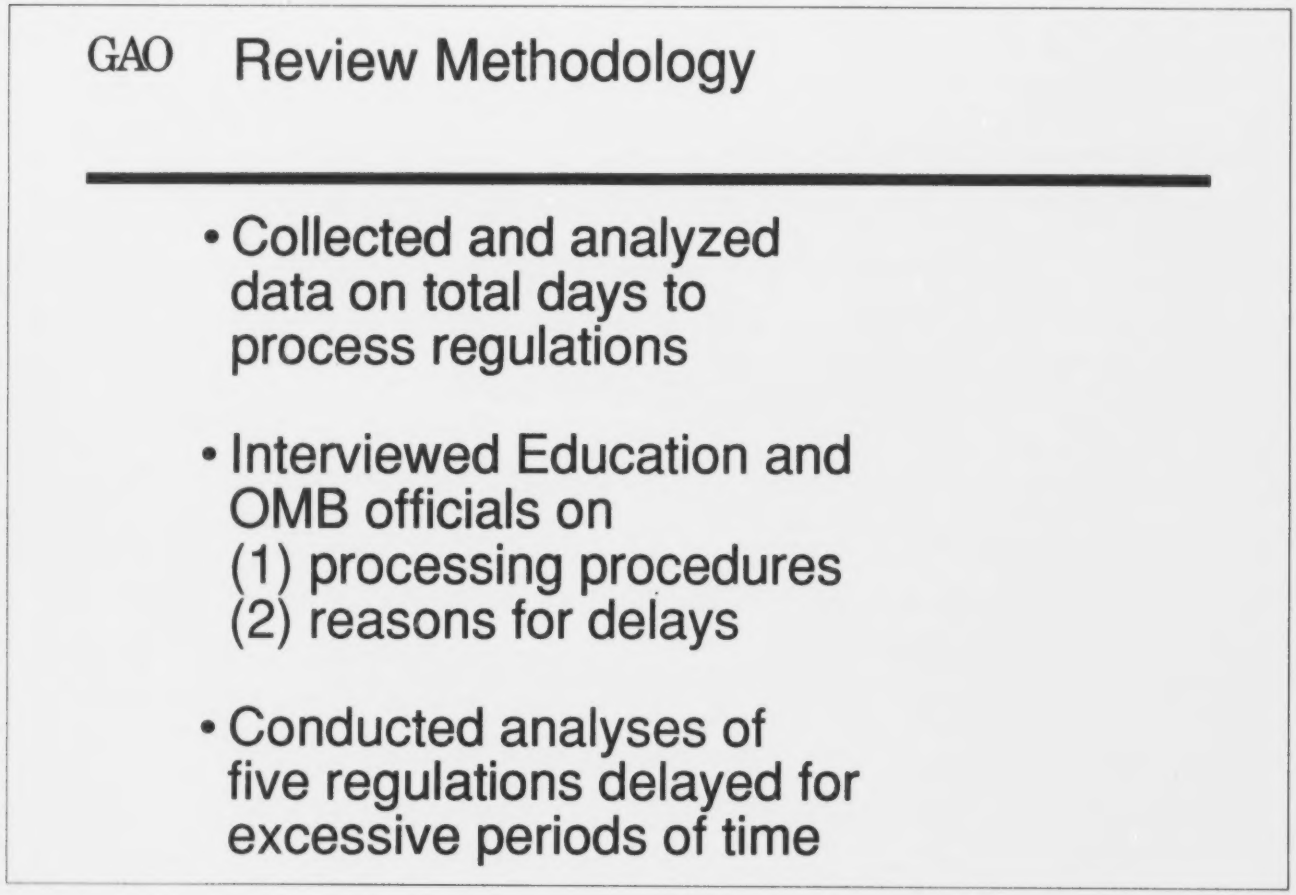

GAO
Review Methodology
• Collected and analyzed data on total days to process regulations
• Interviewed Education and OMB officials on
(1) processing procedures
(2) reasons for delays
• Conducted analyses of five regulations delayed for excessive periods of time

Figure I.4

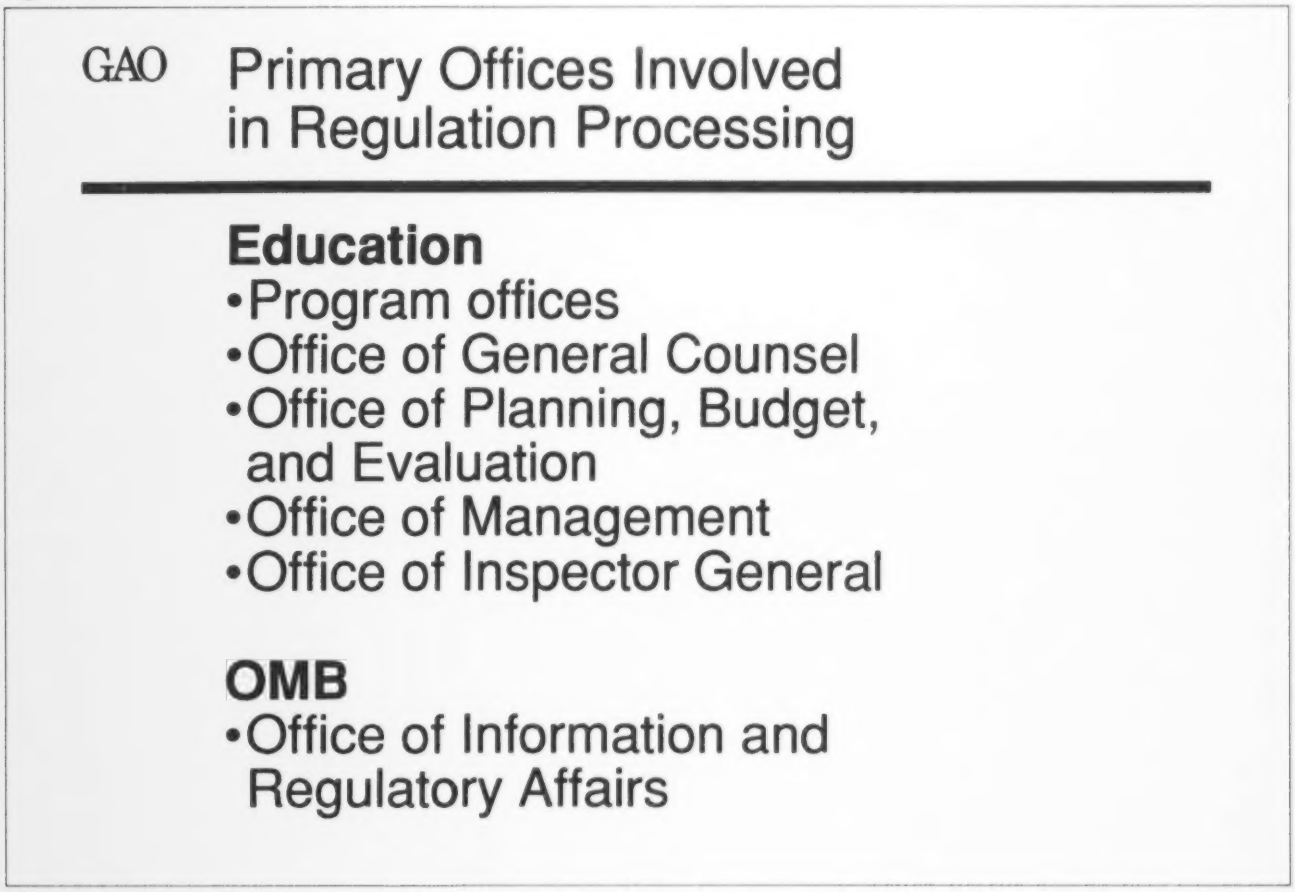

GAO
Primary Offices Involved in Regulation Processing
Education
•Program offices
•Office of General Counsel
•Office of Planning, Budget, and Evaluation
•Office of Management
•Office of Inspector General
OMB
•Office of Information and Regulatory Affairs

Figure I.5

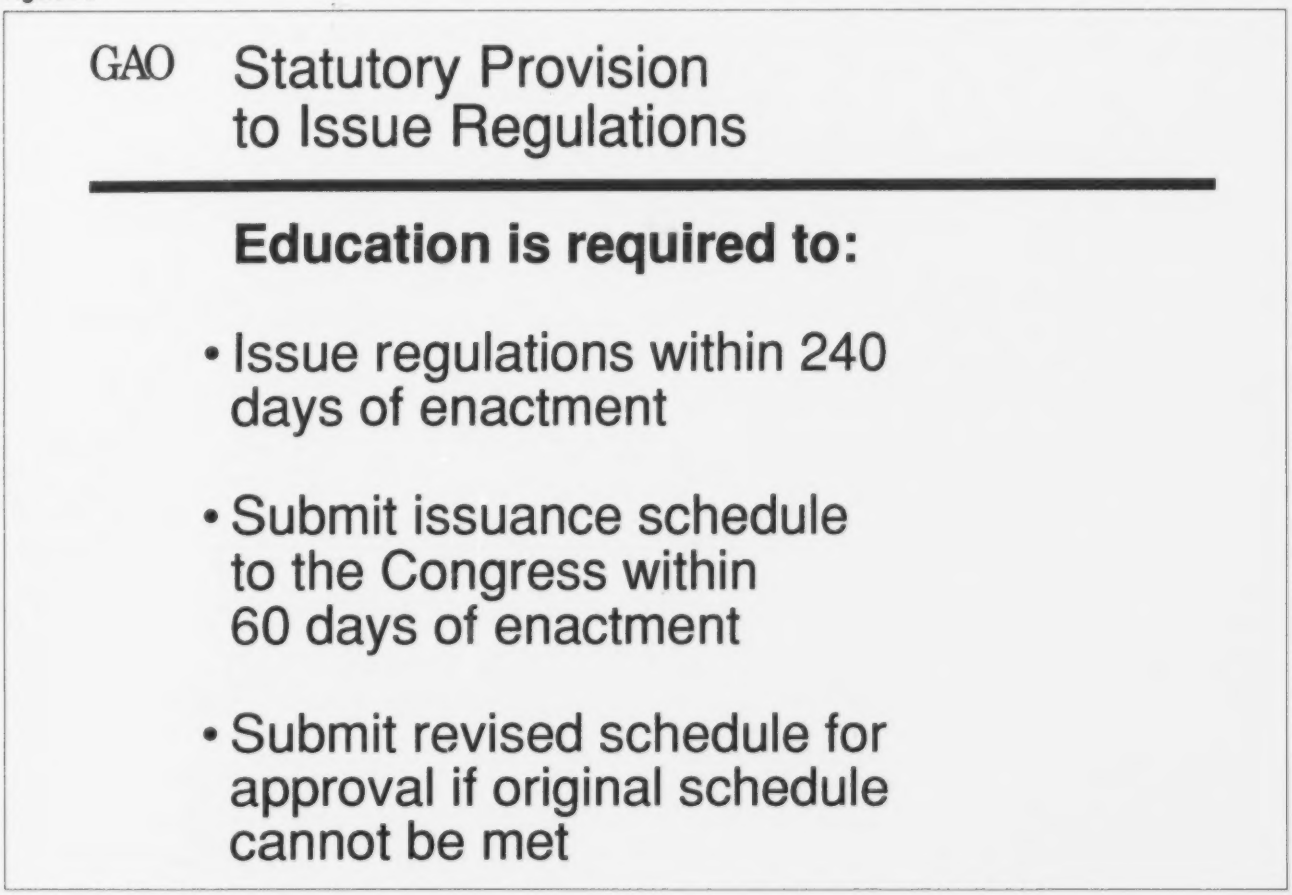

GAO
Statutory Provision
to Issue Regulations
Education is required to:
• Issue regulations within 240 days of enactment
• Submit issuance schedule to the Congress within 60 days of enactment
• Submit revised schedule for approval if original schedule cannot be met

Figure I.6

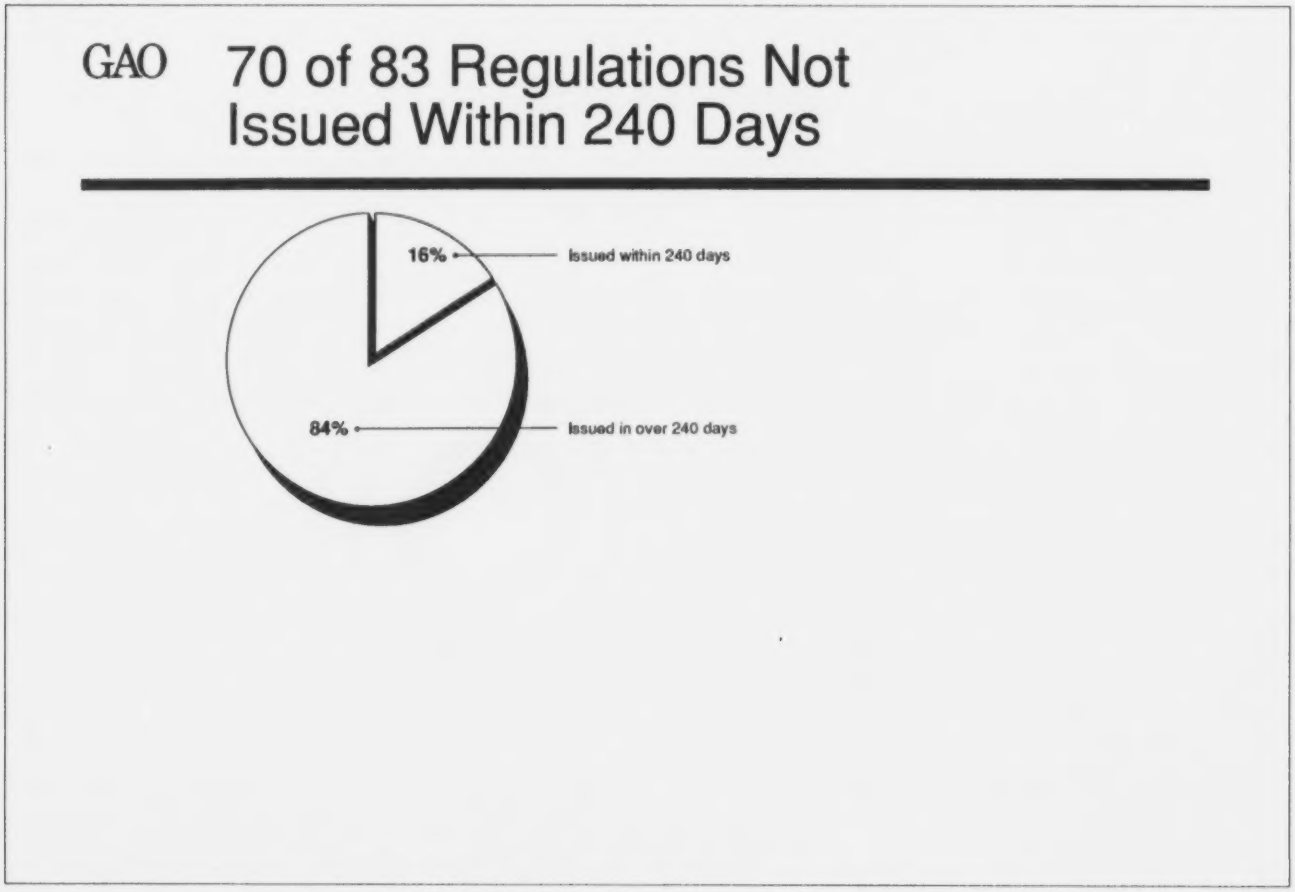

GAO
70 of 83 Regulations Not Issued Within 240 Days
16%
Issued within 240 days
84%
Issued in over 240 days

Figure I.7

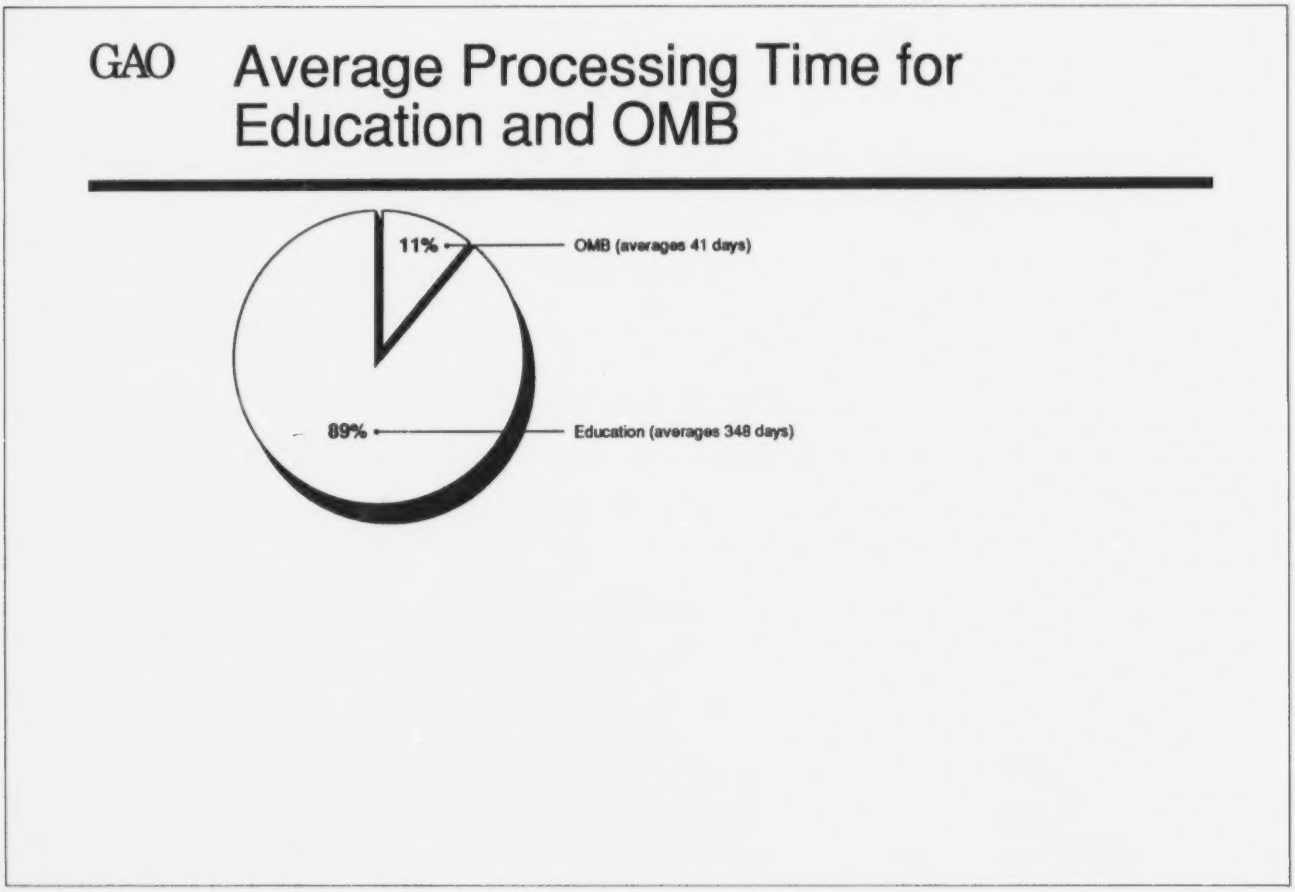

GAO
Average Processing Time for Education and OMB
11%
OMB (averages 41 days)
89%
Education (averages 348 days)

Figure I.8

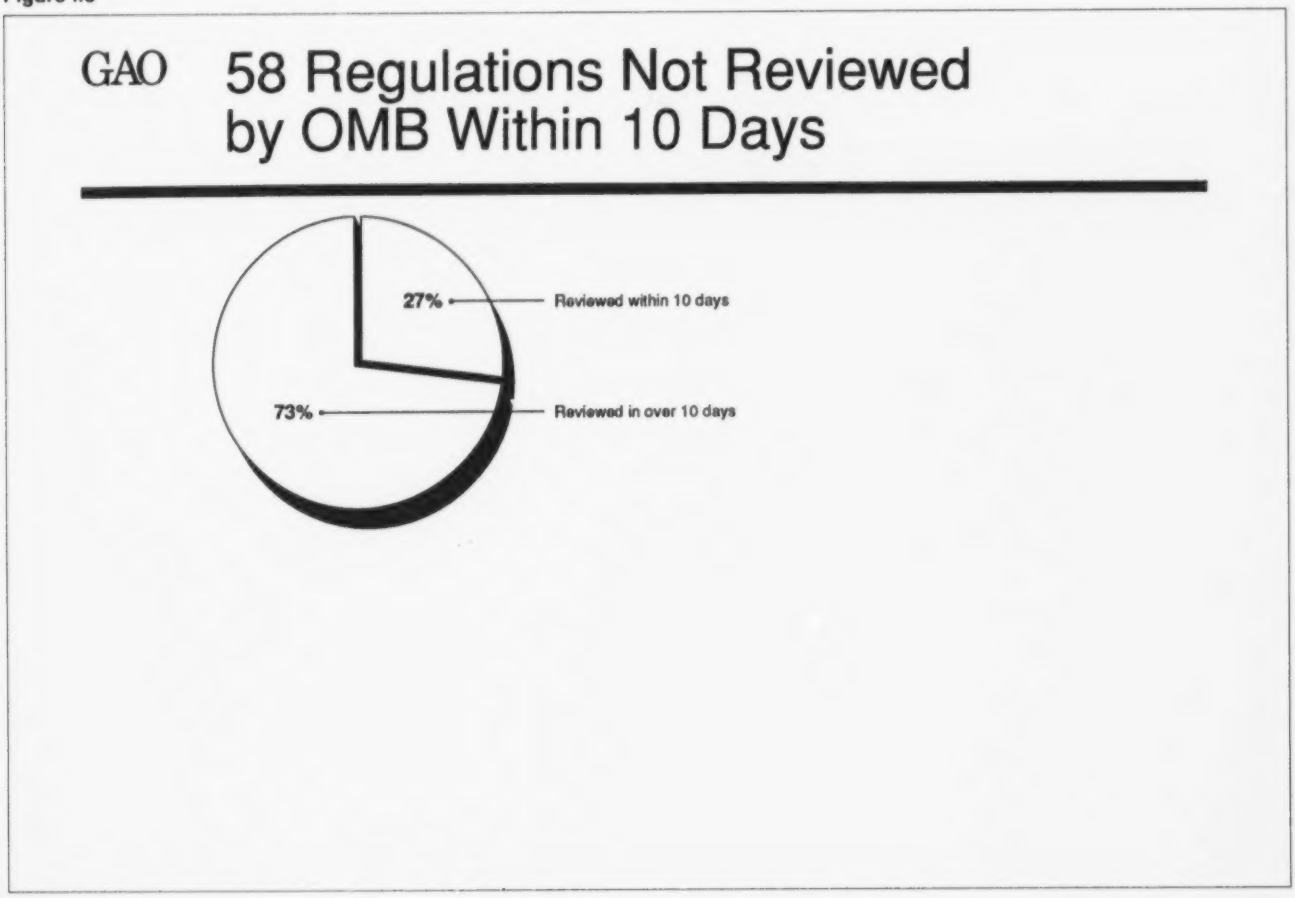

GAO
58 Regulations Not Reviewed by OMB Within 10 Days
27%
Reviewed within 10 days
73%
Reviewed in over 10 days

Figure I.9

GAO
ED Cited Major Reasons for Delays in Issuing Regulations
•Substantial increase in regulations to be issued
•Time-consuming process
•Complex legal and policy issues to address
•Multiple duties and responsibilities in addition to issuance of regulations

Figure I.10

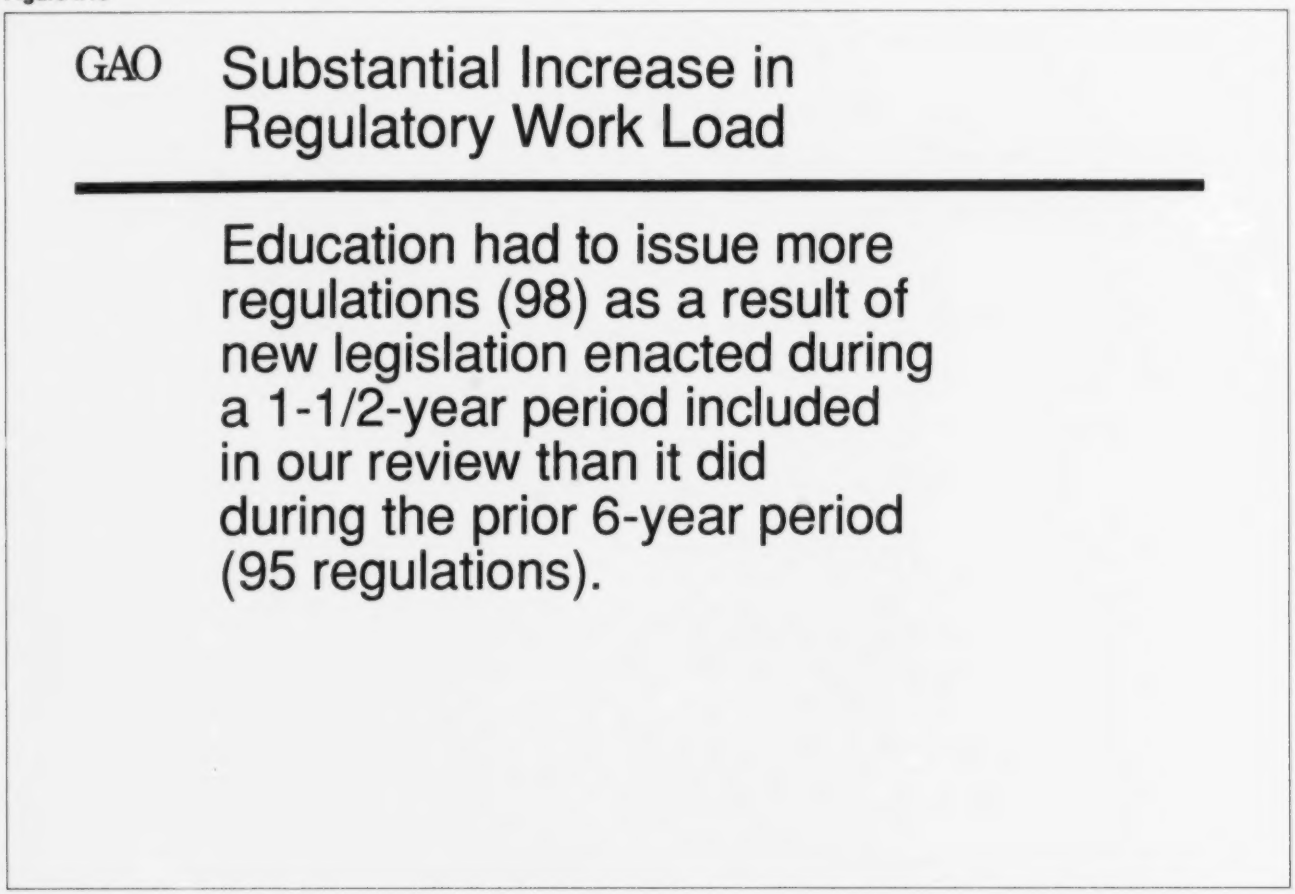

GAO
Substantial Increase in Regulatory Work Load
Education had to issue more regulations (98) as a result of new legislation enacted during a 1-1/2-year period included in our review than it did during the prior 6-year period (95 regulations).

Figure I.11

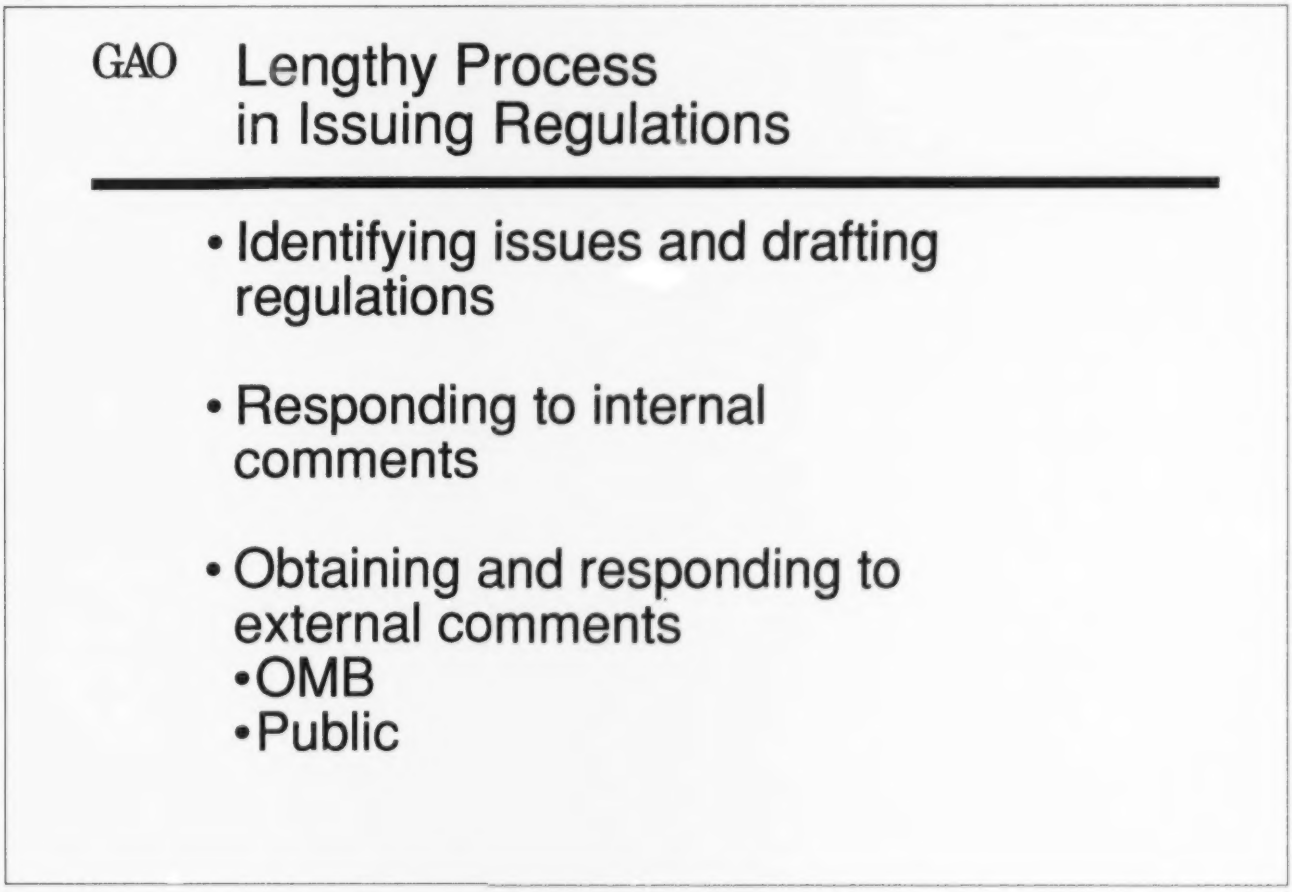

GAO
Lengthy Process in Issuing Regulations
• Identifying issues and drafting regulations
• Responding to internal comments
• Obtaining and responding to external comments
•OMB
•Public

Figure I.12

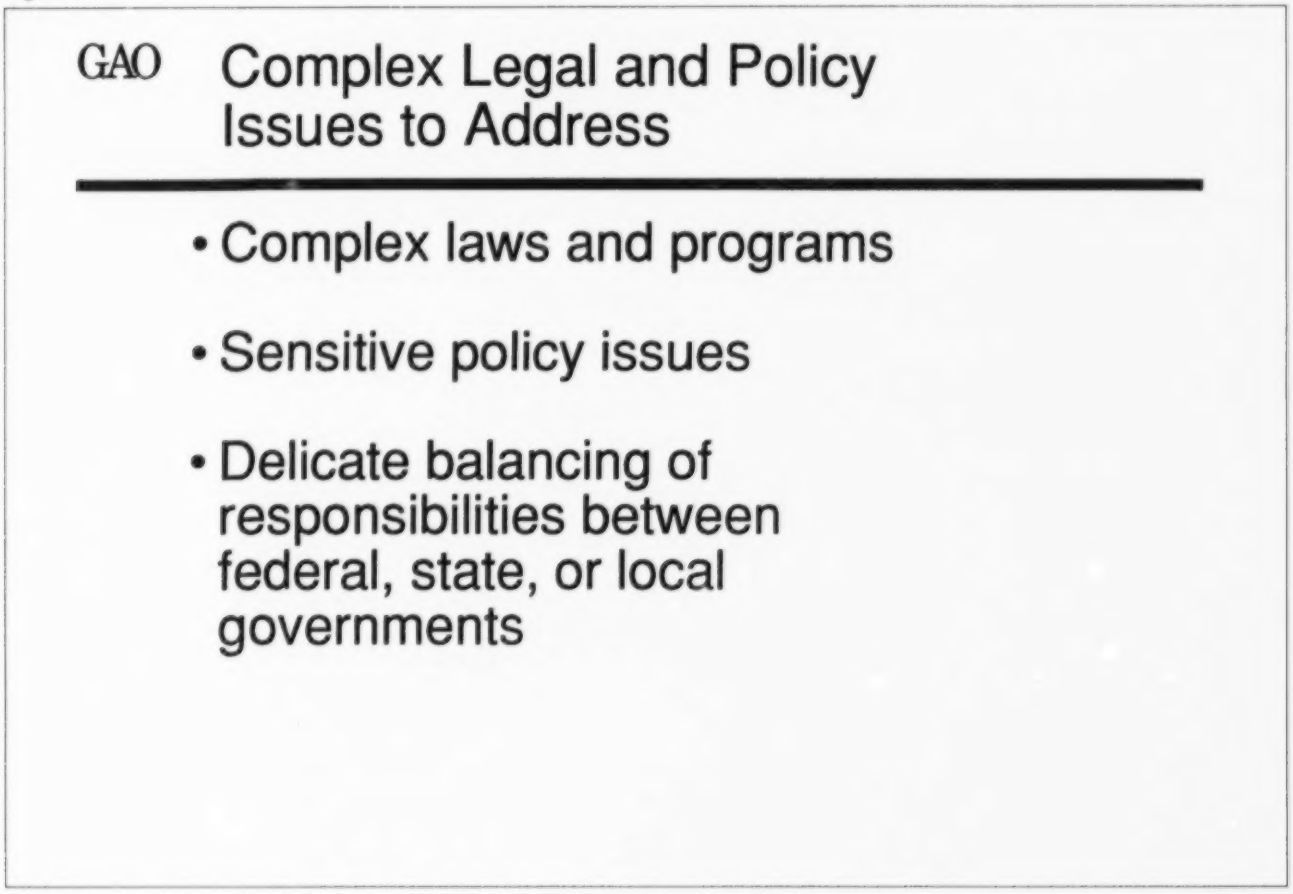

GAO
Complex Legal and Policy Issues to Address
• Complex laws and programs
• Sensitive policy issues
• Delicate balancing of responsibilities between federal, state, or local governments

Figure I.13

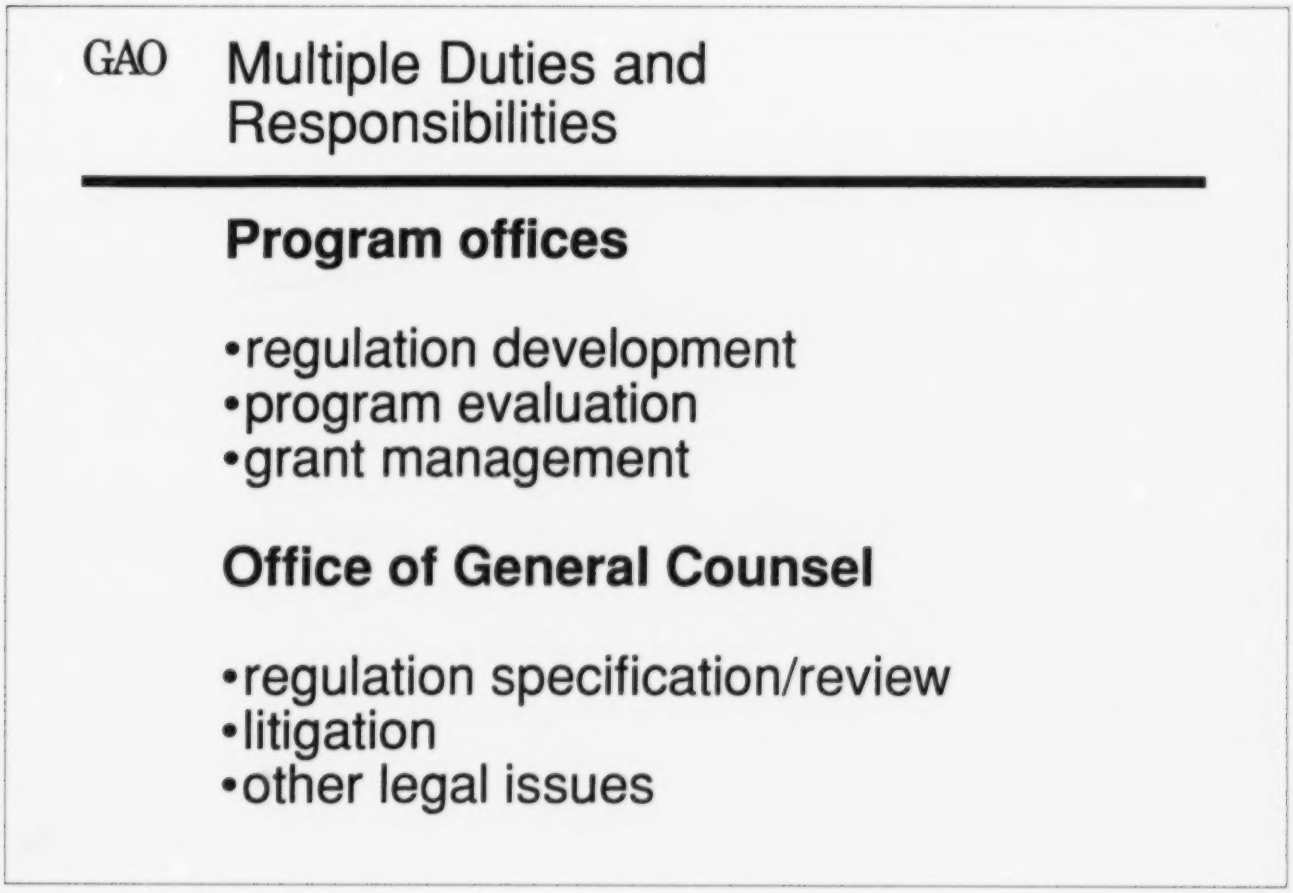
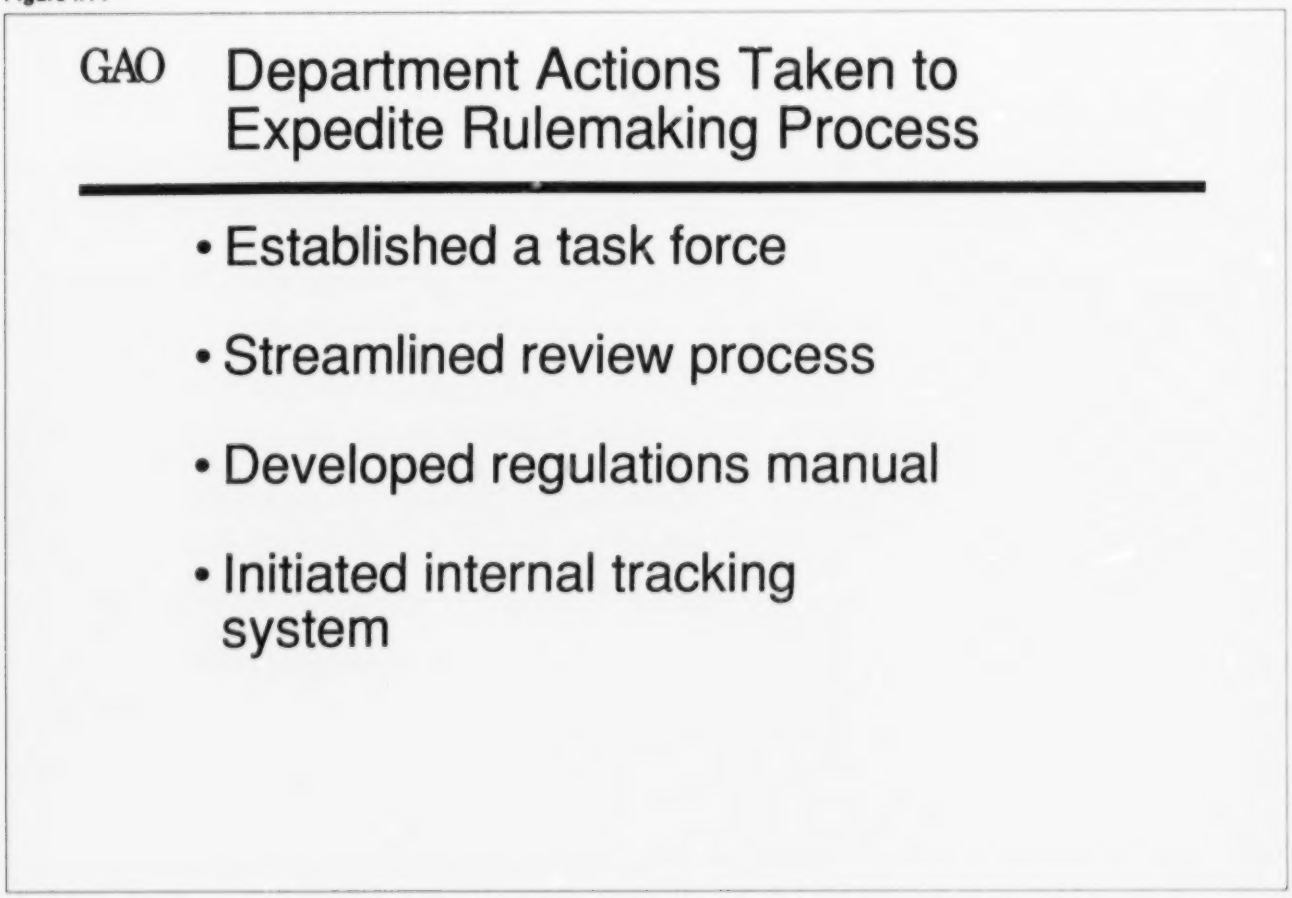

GAO
Multiple Duties and Responsibilities
Program offices
•regulation development
•program evaluation
•grant management
Office of General Counsel
•regulation specification/review
•litigation
•other legal issues

Figure I.14


GAO
Department Actions Taken to Expedite Rulemaking Process
• Established a task force
• Streamlined review process
• Developed regulations manual
• Initiated internal tracking system

Number of Calendar Days to Process 83 Regulations Within Education and OMB

Public law/regulation	Total days	Days in process within Education	Days in process within OMB NPRM[a]	Days in process within OMB Final	Days for public comment
Education of the Handicapped Act Amendments of 1986 (P.L. 99-457)					
Handicapped infants and toddlers	988	822	38	38	90
Assistance to states for education of handicapped children	932	738	55	48	91
Services for deaf/ blind children and youth	922	851	20	21	30
Preschool grants	828	645	37	56	90
Training personnel for the education of the handicapped training information centers	764	670	49	15	30
Captioned film loan services for the deaf; educational media loan service for the handicapped	742	659	10	11	62
Handicapped special studies	658	532	14	22	90
Removal of architectural barriers	512	446	8	10	48
Technology, educational media, and materials for the handicapped	512	456	16	10	30
Regional resource centers	485	434	[b]	51	[b]
Research in education of the handicapped	400	392	[b]	8	[b]
Secondary education and transitional services for handicapped youth	337	332	[b]	5	[b]
Program for severely handicapped children	320	237	17	21	45
Handicapped Children's Early Education Program	307	251	14	12	30
Clearinghouses	280	210	30	10	30
Training personnel for education of the handicapped grants to state educational agencies for traineeships	273	179	49	15	30
Postsecondary education[c]	145	136	[b]	9	[b]

(continued)

Public law/regulation	Total days	Days in process within			Days for public comment
		Education	OMB		
			NPRM[a]	Final	
Higher Education Amendments of 1986 (P.L. 99-498)					
Guaranteed student loan program	[d]				
Regional educational laboratories and research and development centers	668	593	15	15	45
College library technology and cooperation grants	640	563	20	12	45
Educational Research Grant Program	640	558	18	19	45
Library career training	587	487	60	10	30
National resource centers	581	534	6	11	30
Strengthening Research Library Resources Program	574	473	21	18	62
Foreign language and area studies fellowships	532	463	28	11	30
Library Research and Demonstration Program	474	402	[b]	72	[b]
Student assistance general provisions (subpart B)	410	400	[b]	10	[b]
Perkins Loan Program (subpart C)	409	400	[b]	9	[b]
State Student Incentive Grant Program	406	312	29	19	46
Minority Science Improvement Program	391	378	[b]	13	[b]
Pell Grant Program	362	260	[b]	102	[b]
Housing and other educational facilities loan program	301	231	27	13	30
Strengthening institutions programs	301	244	23	4	30
Strengthening historically black colleges and universities	301	245	17	9	30
National diffuse network	301	237	27	7	30
Student assistance general provisions (subpart H)	299	292	[b]	7	[b]
Veterans Educational Outreach Program	298	246	14	8	30
Office of Educational Research and Improvement Fellows Program	297	219	28	20	30
Jacob K. Javits Program	293	245	8	10	30

(continued)

Public law/regulation	Total days	Days in process within			Days for public comment
		Education	OMB		
			NPRM[a]	Final	
Cooperative Education Program	292	230	28	4	30
Income contingent loans	292	217	1	42	32
Undergraduate International Studies and Foreign Language Program	285	275	[b]	10	[b]
International Research and Studies Program	285	275	[b]	10	[b]
Educational Opportunity Center Program	285	275	[b]	10	[b]
Business and International Education Program	285	275	[b]	10	[b]
Student support services	280	271	[b]	9	[b]
Talent search	279	270	[b]	9	[b]
Upward Bound Program	279	270	[b]	9	[b]
Fund for the improvement of postsecondary education innovative projects for community services and financial independence	277	228	6	13	30
Christa McAuliffe Fellowship Program	270	158	58	9	45
HEP/CAMP	257	188	11	10	48
Patricia Roberts Harris Fellows[c]	236	207	[b]	8	[b]
Law School Clinical Experience Program[c]	181	174	[b]	7	[b]
Endowment Challenge Grant Program[c]	173	161	[b]	12	[b]
Congressional Teacher Scholarship Program[c]	161	148	[b]	13	[b]
LEAD[c]	158	102	11	13	32
Pell Grant Family contribution schedule, 1987-88[c]	105	96	[b]	9	[b]
Pell Grant Program cost-of-attendance, 1987-88[c]	105	96	[b]	9	[b]
Higher Education Technical Amendments Act of 1987 (P.L. 100-50)					
Strengthening Institutions Program[c]	72	68	[b]	4	[b]
Strengthening historically black colleges and universities[c]	72	63	[b]	9	[b]

(continued)

Public law/regulation	Total days	Days in process within			Days for public comment
		Education	OMB		
			NPRM[a]	Final	
Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988 (P.L. 100-297)					
Chapter 2 - federal, state, and local partnership for educational improvement	[c]				
Chapter 1 - state operated programs for handicapped children	[c]				
Chapter 1 - Migrant Education Program (SEAs)	543	382	61	40	60
Women's Educational Equity Program	504	387	32	40	45
Impact Aid -Section 3	498	309	72	27	90
State administered and national discretionary programs for adult education	478	308	96	13	61
Mathematics-Science Education—State Programs	470	292	77	39	62
National Program for Mathematics and Science Education	470	365	69	6	30
Chapter 1 - Program for Neglected and Delinquent Children	447	306	69	12	60
National Diffusion Network	407	275	36	36	60
Migrant Education Even Start Program	393	306	23	2	62
Chapter 1 - basic programs operated by local education agencies (LEAs)	387	252	57	18	60
Indian Education Fellowship Program	386	243	56	27	60
Indian education general provisions and discretionary grant programs	379	283	13	21	62
Chapter 1 - Migrant education coordination programs for SEAs	377	365	[b]	12	[b]
Magnet schools assistance	373	248	72	8	45

(continued)

Public law/regulation	Total days	Days in process within			Days for public comment
		Education	OMB		
			NPRM[a]	Final	
General Education Provisions Act—enforcement—OALJ and notice	373	267	27	19	60
Indian education formula grant programs—(LEAs)	372	194	86	30	62
Fund for the Improvement & Reform of Schools and Teaching (FIRST)	370	289	21	14	46
Chapter 1—Even Start Program	330	192	75	10	53
Bilingual education technical amendments	160	121	[b]	39	[b]
SAFA - Section 2 technical amendments	159	119	[b]	40	[b]
Vocational education programs	137	129	[b]	8	[b]

[a]Notice of proposed rulemaking.

[b]Not available.

[c]Technical amendments.

[d]Unissued as of April 15, 1990. As of this date, 1,286 calendar days had elapsed since legislation requiring regulations to be issued was enacted.

[e]Unissued as of April 15, 1990. As of this date, 595 calendar days had elapsed since legislation requiring regulations to be issued was enacted.

Profiles of Selected Education Regulations

Regional Educational Laboratories and Research and Development Centers Program

Program office—Office of Educational Research and Improvement

Time from enactment of legislation to publication of final regulation—668 days

Comments received on Notice of Proposed Rulemaking (NPRM)—3

Length of published NPRM—45 pages

Length of published final regulations—54 pages

Table III.1: Dates of Key Events in Development of Regulation for Regional Educational Laboratories and Research and Development Centers Program

Event	Date
Legislation enacted	10/17/86
Draft regulation sent from program office to Office of General Counsel's Division of Regulatory Management (DORM)	3/17/87
Circulated for internal ED comments	3/20/87
Internal review process completed	2/11/88
NPRM sent to OMB for review and approval	2/24/88
NPRM approved by OMB	3/10/88
NPRM published in Federal Register	3/22/88
End of public comment period	5/06/88
Final regulation incorporating public comments sent from program office to DORM	6/15/88
Circulated for internal ED comments	6/15/88
Internal review process completed	7/19/88
Proposed final regulation sent to OMB for review and approval	7/25/88
Final regulation approved by OMB	8/09/88
Final regulation published	8/15/88

Major reason for delays—Education's May 30, 1990, response to our office stated that:

- These regulations were among 73 new regulations required by the many reauthorization statutes enacted in 1986. Although the Department was successful in markedly improving its productivity in issuing regulations stemming from those laws, the average time for completion of final regulations, including this one, increased due to the vastly increased regulatory work load. However, these regulations were issued in ample time to govern awards for fiscal year 1988, the first year that the regulations were needed.

Chapter 1 - Migrant Education Program

Program office—Office of Elementary and Secondary Education

Time from enactment of legislation to publication of final regulation—543 days

Comments received on NPRM—4,829

Length of published NPRM—53 pages

Length of published final regulations—168 pages

Table III.2: Dates of Key Events in Development of Regulation for Chapter 1 - Migrant Education Program

Event	Date
Legislation enacted	4/28/88
Draft regulation sent from program office to DORM	6/01/88
Circulated for internal ED comments	6/02/88
Internal review process completed	11/02/88
NPRM sent to OMB for review and approval	11/09/88
NPRM approved by OMB	1/09/89
NPRM published in Federal Register	1/26/89
End of public comment period	3/27/89
Final regulation incorporating public comments sent from program office to DORM	7/03/89
Circulated for internal ED comments	7/03/89
Internal review process completed	8/17/89
Proposed final regulation sent to OMB for review and approval	9/01/89
Final regulation approved by OMB	10/11/89
Final regulation published	10/23/89

Major reasons for delays—Education's May 30, 1990, response to our office stated that:

- Publication of the unprecedented volume of regulations required by the many 1986 reauthorization statutes had not been fully completed when the Hawkins-Stafford Act was enacted, thereby continuing to compete for departmental and OMB resources. The 23 regulations, including this one, required by the 1988 Hawkins-Stafford Act severely taxed an already overburdened system.
- The Migrant Education Program regulations involved numerous complex legal and policy issues, and required a careful balancing of interests among migrant children and their parents, local school districts, and state educational agencies.

- The regulations had to be coordinated and kept consistent with the other Chapter 1 program regulations also under development, including Chapter 1/LEAs regulations, which were required by statue to be preceded by regional meetings and negotiated rulemaking before being published in proposed form. With respect to a number of significant policies, publication of the Migrant Education Program regulations had to await the completion of the Chapter 1/LEAs regulations, so that consistency could be maintained among the various Chapter 1 programs.
- The Department provided 60 days for public comment on the proposed rules, 30 days beyond the minimum required by law.
- During the comment period, the Department received nearly 5,000 letters expressing views on the proposed rules, including letters from Members of Congress, many of which presented difficult issues requiring careful examination and considered resolution. Due to the many public comments and the issues presented, the final regulations comprised 168 typed pages.
- The regulations contained certain paperwork requirements, which had to be reviewed and approved by OMB under the Paperwork Reduction Act of 1980.

National Resource Centers for Foreign Language and Area Studies

Program office—Office of Postsecondary Education

Time from enactment of legislation to publication of final regulation—581 days

Comments received on NPRM—10

Length of published NPRM—17 pages

Length of published final regulations—19 pages

Table III.3: Dates of Key Events in Development of Regulation for National Resource Centers for Foreign Language and Area Studies

Event	Date
Legislation enacted	10/17/86
Draft regulation sent from program office to DORM	1/20/87
Circulated for internal ED comments	1/20/87
Internal review process completed	8/27/87
NPRM sent to OMB for review and approval	9/10/87
NPRM approved by OMB	9/16/87
NPRM published in Federal Register	10/02/87
End of public comment period	11/02/87
Final regulation incorporating public comments sent from program office to DORM	1/29/88
Circulated for internal ED comments	1/29/88
Internal review process completed	4/22/88
Proposed final regulation sent to OMB for review and approval	5/06/88
Final regulation approved by OMB	5/17/88
Final regulation published	5/20/88

Major reason for delays—Education's May 30, 1990, response to our office stated that:

- These regulations were among 73 new regulations required by the many reauthorization statutes enacted in 1986. Although the Department was successful in markedly improving its productivity in issuing regulations stemming from those laws, the average time for completion of final regulations, including this one, increased due to the vastly increased regulatory work load. However, these regulations were issued in ample time to govern awards for fiscal year 1988, the first year that the regulations were needed.

Early Intervention Programs for Infants and Toddlers With Handicaps

Program office—Office of Special Education and Rehabilitative Services

Time from enactment of legislation to publication of final regulation—988 days

Comments received on NPRM—2,550

Length of published NPRM—52 pages

Length of published final regulations—224 pages

Table III.4: Dates of Key Events in Development of Regulation for Early Intervention Programs for Infants and Toddlers With Handicaps

Event	Date
Legislation enacted	10/08/86
Draft regulation sent from program office to DORM	1/14/87
Circulated for internal ED comments	1/14/87
Internal review process completed	9/30/87
NPRM sent to OMB for review and approval	10/06/87
NPRM approved by OMB	11/13/87
NPRM published in Federal Register	11/18/87
End of public comment period	2/16/88
Final regulation incorporating public comments sent from program office to DORM	8/23/88
Circulated for internal ED comments	8/23/88
Internal review process completed	5/05/89
Proposed final regulation sent to OMB for review and approval	5/12/89
Final regulation approved by OMB	6/19/89
Final regulation published	6/22/89

Major reasons for delays—Education's May 30, 1990, response to our office stated that:

- These regulations were among 73 new regulations required by the many reauthorization statues enacted in 1986. Although the Department was successful in markedly improving its productivity in issuing regulations stemming from those laws, the average time for completion of final regulations, including this one, increased due to the vastly increased regulatory work load.
- The legal and policy issues under the legislation authorizing this program were numerous and particularly complex, requiring careful coordination with other legislation governing the education of handicapped

children and laws governing numerous state and local agencies and private service providers that are involved with young children.

- The Department initially provided more than 60 days for public comment, exceeding the 30-day minimum required by law. In response to requests for additional time, the Department extended the public comment period by an additional month, bringing the total to 90 days.
- The Department received more than 2,500 letters of public comment on the proposed rules. These letters raised many complex and policy-sensitive issues and required careful consideration and resolution by the Department. Due to the many issues raised in the public comments, the final regulations were extensively revised, and the final document was 224 typed pages in length.
- The regulations contained certain paperwork requirements, which had to be reviewed and approved by OMB under the Paperwork Reduction Act of 1980.

State Administered Adult Education and Discretionary Programs

Program office—Office of Vocational and Adult Education

Time from enactment of legislation to publication of final regulation—477 days

Comments received on NPRM—35

Length of published NPRM—124 pages

Length of published final regulations—149 pages

Table III.5: Dates of Key Events in Development of Regulation for State Administered Adult Education and Discretionary Programs

Event	Date
Legislation enacted	4/28/88
Draft regulation sent from program office to DORM	7/21/88
Circulated for internal ED comments	7/22/88
Internal review process completed	12/16/88
NPRM sent to OMB for review and approval	12/23/88
NPRM approved by OMB	3/29/89
NPRM published in Federal Register	4/12/89
End of public comment period	6/12/89
Final regulation incorporating public comments sent from program office to DORM	6/21/89
Circulated for internal ED comments	6/22/89
Internal review process completed	7/05/89
Proposed final regulation sent to OMB for review and approval	7/27/89
Final regulation approved by OMB	8/09/89
Final regulation published	8/18/89

Major reasons for delays—Education's May 30, 1990, response to our office stated that:

- The unprecedented volume of regulations required by the six 1986 reauthorizations had not been fully completed when the Hawkins-Stafford Act was enacted, thereby continuing to compete for departmental and OMB resources. The 23 regulations, including this one, required by the 1988 Hawkins-Stafford Act severely taxed an already overburdened system.
- The regulations presented numerous complex issues, requiring a careful balancing of the interests of adult beneficiaries and state and local government entities, as well as other agencies and organizations eligible to participate under the various programs affected.

- The Department provided 60 days for public comment, 30 days more than the minimum required by statute.
- The Department received a substantial number of public comments on NPRM, raising many significant issues that required careful consideration and resolution.

Comments From the Department of Education

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL

THE GENERAL COUNSEL

SEP 6 1990

Mr. Franklin Frazier
Director, Education and
Employment Issues
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Frazier:

The Secretary has received your letter of August 9, 1990, transmitting a draft report on the promulgation of certain regulations of the Department of Education.

In general, the draft report accurately presents factual information provided by the Department to GAO staff, with a few exceptions noted in the attachment to this letter. However, the report does not reflect some significant information provided by the Department that is pertinent to the congressional inquiry that led to GAO's review.

The information relating to our major concerns is set forth in the attachment. In summary:

(1) The draft report fails to acknowledge the significant accomplishments of the Department in meeting the enormous regulatory workload caused by the enactment of a multitude of reauthorization statutes in 1986-1988. Through introduction of management reforms and emergency measures, the Department increased the number of regulatory documents it published in fiscal year 1987 by 60 percent over the prior year. Although there was an increase in the average time needed to publish a regulation because of the great number that were required by the new legislation, only 16 of the 83 regulations took longer than 18 months to complete, a remarkable accomplishment under the circumstances.

(2) The draft report omits the information, provided at the request of GAO, showing that this Department compares favorably to other similar Federal agencies in developing regulations.

(3) The draft report fails to acknowledge the information provided by the Department to GAO showing how departmental personnel resources have declined. This necessarily affected the Department's ability to meet the massive increase in regulatory workload caused by the 1986-1988 reauthorizations.

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(4) The draft report omits the information provided by the Department showing that the time required to issue regulations did not harm the programs, inconvenience the public, or cause delay in fully implementing congressional intent. The Department took a number of significant actions to avoid these consequences, including setting priorities among the regulations, issuing interim non-regulatory guidance, and instituting management reforms to facilitate the production of priority documents.

(5) The draft report makes no reference to the suggestions offered by the Department, at GAO's request, for improving the production of regulations for education programs. The Congress could take a number of useful actions in this regard.

I believe that the draft report would be significantly strengthened and would be of much greater use to the Department and to Congress if the above matters were addressed. Thank you for this opportunity to provide the Department's views.

Sincerely,

Edward C. Stringer

ATTACHMENT

I. Errors in the draft GAO report

- The Office of the General Counsel (OGC) does not have to "approve" regulations before they go to the Secretary. Only the Secretary and OMB must approve regulations. (Report, p. 3)

Now on p. 2.

- GAO's diagram of the regulations development process contains two errors: (1) the Department's analysis of legislation typically begins well before enactment, usually when both the House and the Senate have passed bills covering similar programs or subjects; and (2) final regulations always must be approved by the Secretary and OMB (not just "if Needed," as stated in the draft report). (Report, p. 3A)

Now on p. 3.

II. Other matters relating to the draft GAO report

A. The Department's prior record in promulgating regulations

- Under the prior Department of Health, Education, and Welfare (HEW), from 1974 (when the 240-day schedule requirement was enacted) through 1979 (when HEW issued its last education regulations), it took an average of 530 days from the enactment of an education statute to issuance of final regulations.

- From May, 1980, when the Department was created, through August, 1986, Congress enacted legislation requiring the Department to issue 95 regulations. These regulations were issued, on the average, 335 days following enactment of the legislation.

B. The problem faced by the Department in 1986-1988

- From September, 1986 through April, 1988, Congress enacted legislation requiring 98 regulations, including the 83 regulations reviewed by GAO. This was more than the number of regulations required by all legislation enacted in the prior six years of the Department's existence.

- Prior to 1986, the Department had never issued more than 66 regulations in one year (HEW's Education Division once issued 71 regulations in a year (1975)). As a result of the 1986 legislation, the Department's regulatory workload totalled 195 pending regulatory actions.

- The primary reason for the length of time it took to issue all of the regulations under the 1986-1988 laws was the extraordinary number of regulations required to carry out those statutes. For example, in 1986, the Office of Special Education and Rehabilitative Services (OSERS) was faced with the necessity of issuing regulations under both its special education programs (the regulations subject to the GAO investigation) and all of its program authorities under the Rehabilitation Act of 1973, in addition to its pre-existing substantial regulatory workload.

- The effect of the 1986 avalanche of regulations can be seen by comparing OSERS' record in implementing its prior reauthorization legislation, which was enacted in December, 1983 (Public Law 98-199). Under that law, OSERS was required to issue 12 regulations. The regulations were published, on the average, 264 days after enactment of the statute.

- Under the 1986 reauthorizations, OSERS was required to promulgate 17 regulations just for its special education programs, in addition to the regulations required for its vocational rehabilitation programs. The average for OSERS' 17 special education regulations was 553 days from enactment, compared to 264 days under the 1983 legislation when the Department was not faced with the flood of new laws enacted in 1986-1988.

C. The Department's accomplishments

- To meet the enormous regulatory workload stemming from the 1986-1988 enactments, the Department instituted a number of procedural reforms to streamline the Department's clearance procedures, including an earlier start-up of regulations preparation and a reduction in the number of offices within the Department that review draft regulations. This resulted in a 60% increase in the number of regulations published in fiscal year 1987 over the prior year, and a continued higher rate of production of regulations in succeeding years.

- Although the average time for promulgating regulations under the 1986-1988 laws increased over the Department's past record, due to the greatly increased number of regulations under development, all of the regulations were issued without undue delays, under the circumstances. Of the 83 regulations in question, 13 were issued within the initial 240-day schedule, 40 were issued within 12 months, and all but 16 were completed within 18 months of enactment.

- The Department has continued to devise and institute management improvements to assist in issuing regulations even more quickly. For example, the Department was successful in significantly reducing the time taken to issue certain final regulations under the Hawkins-Stafford Act through use of an expedited clearance procedure.

- The Department is also experimenting with an expanded use of automated computer systems to facilitate the clearance of regulations, as available technology permits.

D. The Department's record compared to other Federal agencies

- GAO requested information on other Federal agencies' promulgation of regulations. We found that other Federal agencies do not typically keep information regarding the length of time it takes them to issue regulations. To make a comparison, we surveyed all regulations issued during fiscal year 1989 (October 1, 1988-September 30, 1989) by certain comparable Federal agencies that administer financial assistance programs. The survey did not include regulations based on scientific data, in order to consider only documents similar to the regulations of the Department of Education.

- Thirty such regulations were issued by those other agencies in fiscal year 1989, implementing 51 statutory provisions. For implementation of 22 of the 51 statutory provisions, rulemaking procedures were waived (i.e., no public comment was solicited prior to issuing final regulations).

- The average time taken by those other agencies to issue final regulations was 1140 days from enactment of the pertinent legislation, including regulations for which public comment procedures were waived. By comparison, the Department of Education averaged 367 days from enactment for regulations under new legislation passed in the years 1980-1987. The average for the Department's regulations under review by GAO is approximately 389 days from enactment (with three regulations still pending as of April, 1990).

E. The Department's personnel resources

- Since 1981, the Department's Salaries and Expenses appropriation has declined, in constant dollars, from $291 million in fiscal year 1981 to $230 million in

fiscal year 1989.

- This has resulted in a corresponding decline in the number of employees in the Department (in FTE usage) from 6,883 in 1981 to 4,425 1/ in 1989. During this period, the Department's responsibilities, by any measure (including significantly increased overall appropriations and numbers of separate programs), have expanded substantially. Congress has consistently appropriated less for the Department's Salaries and Expenses account than the amounts requested by the Administration.

- This loss of personnel resources has had a particularly adverse effect on the Department's ability to absorb significant increases in workload in a short period, as happened under the 1986-1988 legislation.

F. Effect of regulations on programs, the public, and implementation of congressional intent

The Department successfully took a number of actions that ensured that the time taken to issue regulations under the 1986-1988 laws did not harm the affected programs, inconvenience affected parties, or delay full implementation of congressional intent.

- No funds have ever been lapsed by the Department due to a failure to issue regulations. When priorities had to be set among regulatory actions, the Department gave first attention to those necessary to make awards within the Federal fiscal year.

- For the Stafford Loan program, the Department gave first priority to issuing regulations on the most pressing problem faced by the Federal program: student loan defaults. Those regulations have been completed and are currently being implemented.

- As an interim measure, the Department issued non-regulatory guidance to assist affected parties in carrying out congressional intent. For example, the Department issued extensive guidance to assist educational institutions, lenders, and guarantee agencies in implementing changes to the Stafford Loan program made by the Higher Education Amendments of 1986. The implementation of the 1986 amendments has in no way been delayed due to the lack of regulations.

1/ The latter figure is updated. In the information initially provided to GAO, the estimated 1989 FTE usage was given as 4,402. However, the difference is negligible.

- 4 -

G. Recommendations for improvement

For some programs, additional extensive public comment periods are mandated by statute (90 days for all regulations under Part B of the Education of the Handicapped Act; 90 days for all regulations for the Impact Aid programs). These comment periods are required regardless of the significance of the particular regulations being proposed.

Under the 1988 Hawkins-Stafford legislation, the Department was required to augment public comment procedures by conducting a series of regional meetings and then a modified regulatory negotiation to determine the content of the Chapter 1 proposed regulations. Not only did the regional meetings and regulatory negotiation add to the time to issue the Chapter 1 regulations, but those add-on procedures took many personnel and other resources that would have been devoted to the other regulations that were being developed under the Hawkins-Stafford legislation.

All of these procedures are added to, not in lieu of, the normal public comment procedures under the General Education Provisions Act (GEPA) and the Administrative Procedure Act, which govern rulemaking by the Department.

The Department has the following recommendations that would assist in avoiding delays in issuing future regulations.

- The Congress should simplify or eliminate the numerous special procedures that apply to the issuance of the Department's regulations, including the mandatory 90-day public comment periods that apply to some regulations.

- The Department reiterates its opposition to regulatory negotiation procedures imposed by Congress on the Department's rulemaking process. An evaluation of the development of the Chapter 1 regulations demonstrated that regulatory negotiation is not an appropriate technique for developing education regulations. Regulatory negotiation, as devised by the Administrative Conference of the United States, is useful where discrete, conflicting economic interests exist, and litigation over the final regulations is likely. These criteria do not apply to the Department's regulations.

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Comments From the Office of Management and Budget

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SEP 13 1990

Mr. Franklin Frazier
Director, Education and
Employment Issues
Human Resources Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Frazier:

Thank you for the opportunity to review and comment on the General Accounting Office (GAO) report, "Regulation Processing: Delays in Issuing Education Regulations," requested by Congressmen Augustus Hawkins, Pat Williams, and William F. Goodling.

The Office of Management and Budget (OMB) appreciates Congress' concern over the time period between the enactment of education statutes and the promulgation of regulations pursuant to such legislation. We welcome the publication of GAO findings, which identify the relative contributions of key players in the regulatory process. OMB continues to work with the Department of Education (ED) to issue regulations expeditiously and responsibly, given the dictates of congressional statutes, administration policy, and OMB review standards as outlined in Executive Order (E.O.) No. 12291.

OMB has concerns, however, over several portions of the report as currently written. These issues relate to incomplete statements about OMB responsibilities for reviewing regulations in accordance with E.O. 12291, and to potentially misleading presentations of the time frame in which OMB acted on rules submitted for review by ED.

Now on p. 5
Now on p. 2

GAO asserts that "OMB is to complete its review within 10 days for both the proposed and final regulations" on page 5 of its report; a similar statement appears on page 3. As noted in Section 3 of E.O. 12291, however, this 10-day period may be extended upon request from the Director of OMB. Given such notice, agencies must consult with OMB concerning a pending regulation, and must "refrain from publishing" a proposed rule until OMB completes its review, or a final rule until the agency has incorporated both OMB views and agency responses into the rulemaking file. Under E.O. 12291, agencies and OMB are to follow these procedures unless they conflict with deadlines imposed by statutes or judicial orders. We believe that the relevant sections of the report should be revised to explicate OMB's authority correctly.

Now on p. 5

OMB also notes that in several places, the report presents review times for both OMB and ED in a misleading context. Specifically, the GAO statement cited above (page 5) could be interpreted as meaning that OMB's 10-day, extendable response time applies to both proposed and final rules, taken together. As GAO mentions elsewhere in the document, the 10-day time frame applies twice: once for the proposed rule, and once for the final. Taken together, OMB has 20 days to respond for both proposed and final rules, and has the authority to extend this time period. This distinction should be noted.

Now on p. 3

We register a similar comment in response to the GAO regulatory flow chart, presented on page 3a. Step #8, review and revision of final regulations, is needed in virtually all cases. The chart should indicate clearly that OMB conducts regulatory reviews at both stages, allowing readers to understand accurately that OMB acts at two different points during the rulemaking process.

Now on p. 6
Now on p. 22

Another case of misleading presentation occurs on page 7, and is repeated in the chart on page 24. GAO repeats the correct assertion by ED officials that their responses to OMB comments added time to the issuance of regulations. But by GAO's accounting methods in this report, the time during which ED responded to OMB concerns is registered as OMB review time, with the exception of two rules (in the 83-rule sample) that OMB suspended after ED had not responded for a period of several weeks.

While we do not disagree with this accounting convention, we object to a means of presentation where ED's response time first appears on OMB's clock, but where OMB is then cited as a contributing factor to the long time frame accounted for on ED's clock. The two statements are contradictory. Assuming that GAO does not revise its accounting procedure, OMB should not be cited as a cause of longer response time by ED.

Now on p. 6

Finally, GAO notes on page 8 that ED program offices must develop regulations while also performing many other duties. OMB appreciates this, and notes that OMB staff also have numerous responsibilities aside from regulatory review. During the 1987-1989 period in which GAO collected its data, OMB staff responsible for reviewing ED rules also examined nearly twice as many submissions of government requests for information from the Department of Education and related agencies; the Paperwork Reduction Act of 1980 requires OMB to review public sector demands for information from private citizens.

In conclusion, OMB welcomes the release of this GAO report on the development of education regulations. We again thank GAO for the

opportunity to comment, and repeat the assurance that OMB and ED will continue efforts to issue rules expeditiously and responsibly.

Sincerely,

James B. MacRae, Jr.
Acting Administrator and
Deputy Administrator
Office of Information and
Regulatory Affairs

cc: Mr. Bill Milletary
GAO Investigator

Major Contributors to This Briefing Report

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